No. 83-1458

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

FRANK E. FERREIRA, and MILGEN INVESTMENT COMPANY,

Petitioners,

vs.

L & M PROFESSIONAL CONSULTANTS, INC. and the CITY OF CHULA VISTA,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of the State of California

BRIEF IN OPPOSITION OF RESPONDENT L & M PROFESSIONAL CONSULTANTS, INC.

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L & M PROFESSIONAL
CONSULTANTS, INC.

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QUESTIONS PRESENTED

1. Given the absence of any Federal authority cited in the Petition, whether Petitioners' claims of denial of procedural due process and unconstitutionality of the quasi-public entity provisions of the California Eminent Domain Law as applied to condemn a necessary ten foot sewer easement across Petitioners' property raise any substantial federal question?

2. Whether the California Court of Appeal erred in finding it unnecessary to decide whether the Just Compensation clause entitles a condemnee to interest greater than seven percent on a condemnation award, where the condemnee (i) stipulated at pretrial tnat the amount of just compensation was not contested;

(ii) failed to withdraw a deposit of just compensation made at the time of filing the action; (iii) remained in actual possession of his property pendante lite; and (iv) failed to introduce any evidence of market rate interest at trial?

3. Whether sanctions for a frivolous petition taken apparently for the purposes of delay are appropriate.

RULE 28.1 STATEMENT

Respondent L & M PROFESSIONAL CONSULTANTS, INC., a California corporation, has no parent or subsidiary companies or affiliates as defined in Rule 28.1 of the Rules of the United States Supreme Court.

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STATEMENT OF THE CASE

The case is concisely and accurately stated in the opinion of the California Court of Appeal, Fourth Appellate District, Division One, attached as Appendix "B" to the Petition. See Appendix "B" to the Petition, pp. B(1)(d)-B(3), reported at 146 Cal.App.3d 1038, 1045-1047 (1983).

ARGUMENT

Petitioner ("FERREIRA") owns or controls all land adjacent to Respondent ("L & M")'s property through which a clearly necessary sewer line and drain pipe must pass to enable planned homes on Respondent's property to hook up to the sewer and drainage system of the City of Chula Vista, California ("CITY").

Rather than itself condemning property for addition to the CITY sewer and

and drain system, CITY required Respondent to bear the burden and cost of such acquisition as part of Respondent's development, under the quasi-public entity provisions of California's Eminent Domain Law. Cal. Code of Civil Procedure § 1245.325; Cal. Civil Code § 1001. The easement, once acquired, must be dedicated to the CITY.

Petitioner FERREIRA, himself a developer, objected to the taking of any easement across his properties in any location. Without such an easement, Respondent's property, known as Villa San Miguel, cannot be developed (146 Cal.App.3d at 1050) and Respondent's investment of over $1 million on the project will be lost (VI R.T. 83:9-14).

The petition presents no issues of the kind set forth in this Court's Rule 17 governing issuance of the writ of certiorari. This dispute between

neighbors raises no substantial federal questions warranting consideration by this Court. Indeed, the petition -- a remake of the unsuccessful petition for hearing in the California Supreme Court -- cites not a single decision of this Court except in a passing quotation from the opinion of the Court of Appeal. Petition, at 61.

The issues raised in the petition are frivolous. This case illustrates the extent to which the patience of the judicial system may be tried by a wealthy landowner sitting in a monolopy position controlling all of the property over which a clearly necessary sewer and drainage easement must run. FERREIRA consistently opposed all suggested easement routes, including his own. Throughout the proceedings he continued to shift positions, always claiming that some other solution was preferable. His

tactic was designed to avoid finality and the determination of an appropriate easement route. FERREIRA repeatedly refused to settle on an agreed upon route, and claimed there was not enough gold in Fort Knox to compensate for any taking. (XIV R.T. 430.)

If the taking is not permitted, Respondent's property will be rendered virtually valueless. No buyer could be found for a 10.9 acre residential parcel without necessary sewer and drainage hookups. Except one. The one who controls such access: FERREIRA.

Given the absence of federal case authority for any point raised, Petitioner's contentions may be disposed of briefly.

I

THE FACIAL AND AS-APPLIED CHALLENGES TO THE CALIFORNIA CONDEMNATION LAW ARE FRIVOLOUS.

Petitioners' challenges to the California Eminent Domain Law, on its face and as applied in this quasi-public entity taking, rest on Petitioners' insistent mischaracterization of the taking as a private taking for a private purpose. It is not.

A. Civil Code Section 1001 and Code of Civil Procedure Section 1245.325 Are Constitutional.

The statutory scheme is essentially a codification of Linggi v. Garovotti, 45 Cal.2d 20 (1955). The Constitutional authority of that private property owner to condemn for utility access was unambiguously upheld by the California Supreme Court. The Linggi requirements

are continued in the statutory provisions. Far from being ambiguous or vague on its face, the statutory scheme is quite specific. The factors required by the court in Linggi are specifically enumerated in the various statutes. All have been met here.

Petitioners suggest by innuendo that this condemnation is not for a public use. FERREIRA states that since the taking of the drainage easement will benefit a private residential development, it is for a private purpose and not a public use. Cities have considerable discretion in identifying and implementing public uses. City of Oakland v. Oakland Raiders, 31 Cal.3d 656, 665 (1982). FERREIRA's assertion flies in the face of the long settled rule of law that the taking of private

property for the construction of necessary sewer and storm drain systems is a taking for public use:

> "Common sewers fall within the class of improvements which furnish the public with necessities and conveniences of life and, therefore, constitute a public use in behalf of which eminent domain may be exercised." (2A Nichols on Eminent Domain (3d Ed. 1983) at 7-237 and numerous cases there cited.)

Nichols continues, citing Linggi:

> "'Sewage disposal and sanitation are normally public functions. Maintenance of proper health standards by requiring adequate sewage systems redounds to the benefit of the entire community. While the proposed right-of-way is to be used to run a sewage line to serve plaintiff's property, and in that sense is to be used for a private purpose, in serving plaintiff's property the sewage line will be used to carry out a public purpose and the land will thus be devoted to a public use.'" (Nichols, supra, at 7-238.)

It has also been settled for decades that the taking of private property for the construction of a storm drain system is a taking for public use. Orr v. Allen, 248 U.S. 35, 36 (1918); Frustuck v. City of Fairfax, 212 Cal.App.2d 345, 358 (1963); Sheffet v. County of Los Angeles, 3 Cal.App.3d 720, 735 (1970); 2A Nichols on Eminent Domain (3d Ed. 1983) at 7-239 -- 7-240 and numerous cases there cited; see also Bauer v. Ventura County, 45 Cal.2d 276 (1955); Southern Cal. Gas Co. v. Los Angeles Flood Control Dist., 169 Cal.App.2d 840, 846-847 (1959).

Under Civil Code Section 1001 the California Legislature has determined that condemnation for acquiring necessary offsite sewer and drainage easements is a public use. Under Section 1240.010 of the Code of Civil Procedure,

where the legislature provides by statute that a use is one for which the power of eminent domain may be exercised, such legislative action is deemed to be a declaration by the legislature that such use is a public use. The power to declare what uses of property shall constitute a public use rests with the legislature. People v. Olsen, 109 Cal. App. 523, 530 (1930). Here the legislature has specifically identified the very public use for which L & M seeks to acquire the easement as a public use, and in so doing has acted squarely and specifically within the holdings of Linggi and other cases cited above.

B. The Statute is Not Void for Vagueness.

Neither CITY, the trial court nor the Court of Appeal had any difficulty understanding and applying the statutory test of "great necessity" and the standards

for determining location. In this case the "great necessity" is simply that without sewer and drain access Villa San Miguel and contiguous raw and partially developed parcels are "sewerlocked" and undevelopable. 146 Cal.App.3d at 1050, 1051. The standards are no more vague than a thousand others applied daily across the land by courts and juries (e.g., "by a preponderance of the evidence"; "more probable than not"; "reasonable cause to believe"; "beyond a reasonable doubt"; etc.).

II

DUE PROCESS DOES NOT REQUIRE THAT PETITIONERS HAVE "THE LAST WORD" - IT REQUIRES ONLY THAT PETITIONERS HAVE THE FULL AND FAIR OPPORTUNITY TO BE HEARD WHICH WAS ACCORDED THEM.

The thrust of Petitioners' contention is that the due process clauses of the state and federal constitutions

specifically require that Petitioners should have been provided an additional public hearing on August 28.

Due process of course requires that before a property owner may be finally deprived of an interest in his property, he be given notice and an opportunity to be heard concerning the deprivation. Matthews v. Eldridge, 424 U.S. 319, 348-349 (1976); Horn v. County of Ventura, 24 Cal.3d 605, 612 (1979). (Respondent will not repeat here the arguments set forth in its Respondent's Brief to the Court of Appeal demonstrating why no taking occurred before the CITY, which merely authorized Respondent to initiate a suit to condemn, for even if a deprivation occurred, Petitioners were given full due process.)

Petitioners concede they were accorded full and ample due process at the August 14 public hearing. Petitioners

voice no objection to the due process accorded them at trial (which was in all respects a trial de novo). Their claim is essentially a contention that they were entitled to some more due process on August 28. "Due process insists upon the opportunity for a fair trial, not a multiplicity of such opportunities." Dami v. Dept. of Alcoholic Bev. Control, 176 Cal.App.2d 144, 151 (1959).

At the outset, the challenged ruling of the CITY that the public hearing had been closed as of the conclusion of the presentations on August 14 operated neutrally. No party was accorded an opportunity to make a further presentation. The ruling applied to L & M as well.

The sufficiency of notice and hearing is determined by considering the purpose of the procedure, its effect on

the rights asserted, and other circumstances. Anderson Nat'l. Bank v. Luckett, 321 U.S. 233, 246-247 (1944). As noted by the court in Dami v. Dept. of Alcoholic Bev. Control, 176 Cal.App.2d 144, 151 (1959):

> "Due process cannot become a blunderbuss to pepper proceedings with alleged opportunities to be heard at every ancillary and preliminary stage, or the process of administration itself must halt." Id. at 151.

At the August 14 hearing, each party was given the opportunity to speak to his heart's content. Three or four rounds of rebuttal were permitted. The trial court found that the CITY allowed a great deal of liberality and showed no arbitrariness in its hearing; that the defendants and their attorney were familiar with the format of Chula Vista City hearings; that the defendants had ample notice of the hearings; and that

the defendants were accorded an ample opportunity to present their views at the hearing of August 14, 1979, and a realistic opportunity to protect their interests. (II C.T. 364.)

Petitioners quarrel with the practice of the CITY in permitting a staff summary and recommendation after the presentation of public evidence. Agency subordinates, e.g., staff, may sift the evidence and make recommendations to the agency head. Norris & Hirshberg v. S.E.C., 163 F.2d 689, 693 (D.C. Cir. 1947). The claim of Petitioners appears to be that the references by City Engineer Lippitt in his summary of the evidence on August 28 to the conversations among the parties between August 14 and August 28 somehow created in Petitioners a right to present additional or different evidence in rebuttal to the summary of the City Engineer.

The courts below found that CHULA VISTA's practice as demonstrated at the August 28, 1979, hearing of allowing a staff summary and evaluation of the testimony taken at a public hearing is not inconsistent with due process in this case. (II C.T. 364.) The transcripts of the City Council hearings on August 14, 1979, as a whole, show that the alternative offered by the defendants, which would involve no condemnation, had been rejected, and that the only purpose for the continuance was for staff to determine whether FERREIRA's eleventh hour blue driveway easement proposal was feasible. (II C.T. 364.) At the continued hearing on August 28, the City Engineer reiterated in more detail his position which he originally took on August 14, supporting the blue driveway easement proposed by the defendants at

the August 14 hearing because it involved the least damage to the defendants. (II C.T. 365.)

For an alleged irregularity (such as the taking of evidence outside of the hearing) to be the basis for reversal, it must be shown to be prejudicial under California law. See Gore v. Board of Medical Quallity Assurance, 110 Cal.App. 3d 184, 192 (1980). Lippitt's recommendation, made on August 28, was to reject L & M's proposed location and to support FERREIRA's blue easement proposal. Far from being prejudicial, Lippitt gave support for the blue easement which FERREIRA's attorney had vigorously described as being the least injurious if an easement were to be condemned.

Petitioners now suggest that had they been permitted to speak on August 28, they would have presented evidence

on something Petitioners describe as "blue easement No. 2."

Accepting as true for the moment the dubious proposition that this is what FERRERIRA had in mind, Petitioners have advanced no reason why this alternative could not have been presented at the August 14 hearing. The purpose of the August 14 hearing was for Petitioners to present their view of the least damaging easement location. They did so, and argued at length that the blue driveway easement was the best and least injurious proposal. Petitioners' claim amounts to a contention that in the ensuing two weeks they came up with a better idea. Yet on August 29, the day after the "closed" hearing, Petitioners' counsel reiterated to the City that FERREIRA's blue easement presented <u>at the August 14 hearing</u> was the "least damaging to his property in the event the Council

decided some form of easement was necessary." (Mandamus Exhibit "F.") Petitioners' due process claims are specious.

III

THE QUESTION OF WHETHER THE JUST COMPENSATION CLAUSE MANDATES MARKET RATE INTEREST IN CONDEMNATION PROCEEDINGS WAS NOT DECIDED BY THE COURT OF APPEAL AND WAS NOT NECESSARY TO ITS DECISION.

In September, 1979, Respondent L & M filed its action to condemn the easement and deposited probable compensation in favor of Petitioners of $8,350 together with an appraisal report substantiating that amount. 146 Cal.App.3d at 1047; I C.T. 25-51.

Petitioners neither withdrew the deposit nor challenged it as insufficient as they were entitled to do under Cal. Code of Civil Procedure Section 1255.210,

et seq. Instead, Petitioners stipulated before trial that:

> "The landowners are not contesting the issue of fair market value compensation (as of the present date of value) in this case and are only challenging the legality of the right to condemn." (III C.T. 19.)

The trial court correctly found Petitioners had stipulated to just compensation and waived the right to litigate that issue. XIV R.T. 424-438. The trial court fixed just compensation at $8,400, based on the appraisal report updated to the date the court fixed compensation, and awarded seven percent interest thereon. (Id.) Several months later Respondent made its final deposit of total compensation.

Petitioners cannot now be heard that market rate interest is compelled under the Just Compensation clause, because the interest rate issue was:

(1) Waived by virtue of Petitioners' stipulation that they were not contesting just compensation, but only the right to take. (III C.T. 19; XIV R.T. 424-438.)

(2) Properly decided by the Court of Appeal, even if not waived, because Petitioners continued in actual use and possession of their property during trial, the value of which use is presumed equal to and offset from any interest accruing on the amount of just compensation. Cal. Code Civ. Pro. Section 1268.330. (The full text of this section is set forth in Appendix "A".)

(3) Properly decided by the trial court in any event, since even under Petitioners' "Federal rule" of market

rate interest, the amount is a question of fact for the trier of fact, and the trial court was free to determine the appropriate rate. See, e.g., Miller v. United States, 620 F.2d 812, 837 (Ct. Cl. 1980). Given the absence of proof by Petitioners as to what the rate should have been, an award of no interest would have been appropriate. It follows, a fortiori, that the trial court's award of seven percent, without diminution for the value of continued possession, was proper.

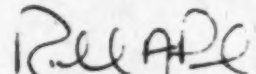
CONCLUSION

The paucity of Federal authority advanced in the petition, and the absence of any issue of the kind described in this Court's Rule 17, strongly suggest that this petition was filed for the purpose of delay. Respondent has been

forced to carry Villa San Miguel from 1979 to the present awaiting final judicial resolution of its right to sewer and drainage connections. We ask that the Court dispose of the petition with all appropriate speed, and award sanctions to deter resort to this Court on insubstantial matters not meeting the requirements of Supreme Court Rule 17.

DATED: March 17, 1984

Respectfully submitted,



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APPENDIX "A"

Cal. Code Civ. Pro. Section 1268.330 provides, in part:

"If, after the date that interest begins to accrue, the defendant:

(a) Continues in actual possession of the property, the value of such possession shall be offset against the interest. For the purpose of this section, the value of possession of the property shall be presumed to be the legal rate of interest on the compensation awarded. This presumption is one affecting the burden of proof." (Bender, 1984.)